

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE**

**ALYSSA ISEMAN and
POSITIVELY MEDIEVAL, LLC**

Plaintiffs,

v.

M. JACOB WERNER,

Defendant.

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Case No. 3:19-cv-00365-TRM-DCP

MOTION FOR LEAVE TO SUBSTITUTE PROPOSED AMENDED PLEADING

Come the Plaintiffs, Alyssa Iseman (“Ms. Iseman”) and Positively Medieval, LLC (“Positively Medieval”) (collectively “Plaintiffs”), pursuant to Federal Rule of Civil Procedure 15 and Local Rule 15.1, and respectfully move this Court for leave to substitute the proposed second amended complaint attached hereto as Exhibit A, for the document originally attached to the pending Motion to Amend {Doc. No. 18}. In support thereof, Plaintiffs state as follows:

1. On April 27, 2020, Plaintiffs filed a Motion to Amend the Complaint [Doc. No.18] pursuant to Fed. R. Civ. Pro. 15(a)(2) and Local Rule 15.1. The motion requested leave to file a Second Amended Complaint which asserts alternative causes of action against the defendant, attorney Jacob Werner (“Defendant”), and additional facts to support these causes of action.

2. Pursuant to Local Rule 15.1, a proposed Second Amended Complaint was attached as Exhibit 1. The proposed Second Amended Complaint asserts that, if Defendant was not Plaintiffs’ attorney, he was a central player in the scheme to defraud Plaintiffs out of their investment of \$650,000. The Second Amended Complaint alleges causes of action for common-law fraud, negligent misrepresentation, conversion, and violation of the Tennessee Consumer Protection Act. The Second Amended Complaint contains new factual allegations to support these

causes of action. The Motion to Amend explains that these facts were learned through discovery and were not available at the time that the original Complaint was filed. *Union Ins. Co. v. Delta Casket Co., Inc.*, Case No. 06-2090, 2009 WL 10664832, at *2 (W.D. Tenn. July 9, 2009).

3. The time for Defendant to file his response to the Motion to Amend has not yet run. However, just today, Defendant filed a response in opposition [Doc. No. 19] which challenges the TCPA claim. The sole basis for the opposition is that Defendant asserts that the TCPA does not provide a cause of action for securities fraud. In his response, Defendant elaborates upon the allegations in the proposed Second Amended Complaint relating to the investment's being a security. *See, e.g.*, p. 7 ("It is abundantly clear that the basis for the Plaintiffs' TCPA claim is alleged unfair or deceptive acts or practices involving the marketing and/or sale of a security, i.e., one or more bonds.") Notably, Defendant does not challenge the claim of common-law fraud.

4. Since the filing of the Motion to Amend, Plaintiffs have consulted with an expert in securities law, including both federal law and state law. Based upon that information and after further legal research and analysis of the facts surrounding the fraud, it is evident that Plaintiffs have legitimate causes of action under §10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 as well as claims under Tennessee's "Blue Sky" law, Tenn. Code Ann. § 48-1-121(a).

5. Having determined that the facts supporting their claim for common-law fraud will also support a claim for these statutory violations, Plaintiffs seek leave to replace the version of the Second Amended Complaint attached to the Motion to Amend with the document attached hereto as Exhibit A. The only material difference between the two documents is that Exhibit A contains two new counts, one under federal law and the other under state law.

6. Plaintiffs aver that granting this motion will not cause any prejudice to Defendant, particularly where he already acknowledges that the investment involves the marketing and/or sale

of a security. Further, there has been no further discovery since the Motion to Amend was filed, and the granting of this motion will not impact the trial date.

7. For these reasons, Plaintiffs respectfully urge the Court to grant this motion and to grant the original Motion to Amend.

8. Based upon this filing, Plaintiffs recognize and acknowledge that Defendant should be allowed to file a supplemental response to the Motion to Amend, and Plaintiffs do not object to additional time for any response to this motion.

Respectfully submitted,

/s/ Michael S. Kelley
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CERTIFICATE OF SERVICE

I hereby certify that on May 8 2020, a copy of the foregoing Motion for Leave, with proposed Second Amended Complaint, was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system.

KENNERLY, MONTGOMERY & FINLEY, P.C.

By /s/ Michael S. Kelley
Michael S. Kelley (BPR # 14378)